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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-734

ELIZABETH A. SMITH, ET AL.,

Petitioners

vs.

ROBERT TROYAN, ET AL.,

Respondents

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

# RESPONDENTS' REPLY BRIEF TO PETITIONERS' SUPPLEMENTAL BRIEF

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TABLE OF CONTENTS


| | | Page |
|---|---|---|
| I. | PRELIMINARY STATEMENT . . . . | 1 |
| II. | FACTS . . . . . | 2 |
| III. | THE DISTRICT COURT'S SEPTEMBER 6 ORDER IS AN APPEALABLE INTER-LOCUTORY INJUNCTION . . . . . | 8 |
| IV. | CONCLUSION . . . . . | 12 |
| | CERTIFICATE OF SERVICE . . . . . | 13 |
| | EXHIBIT "A" 28 U.S.C.§1292(a)(1) . . . . | A-1 |
| | EXHIBIT "B" ORDER OF THE DISTRICT COURT DATED APRIL 4,1973 . . . . | A-2 |
| | EXHIBIT "C" ORDER OF THE DISTRICT COURT DATED AUGUST 24,1973 . . . . | A-4 |


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# TABLE OF AUTHORITIES

## CASES


| | Page |
|---|---|
| Enelow v. New York Life Insurance Co., 293 U.S. 379 (1935) . . . . . | 9 |
| Ettelson v. Metropolitan Life Insurance Co., 317 U.S. 188 (1942) . . . . . | 9 |
| General Electric Co. v. Marvel Rare Metals Co., 287 U.S.430 (1932) . . . . | 9 |
| Hotel & Restaurant Employees v. Del Valle, 328 F. 2d 885 (1st Cir.1964) . . . . . | 9,11 |
| Liberty Mutual Insurance Co. v. Wetzel, ___ U.S. ___ 44 U.S.L.W. 4350 (No.74-1245 March 23,1976) . . . . . | 1,2,12 |
| McCoy v. Louisiana State Board of Education, 345 F. 2d 720 (5th Cir.1965) . . . . . | 9,11 |


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Page

Ring v. Spina,
166 F. 2d 546
(2nd Cir.1948) . . . . . 9

United States v.
Cities Service Co.
410 F. 2d 662
(1st Cir.1969) . . . . . 9

TREATISE

Barron & Holtzoff,
Federal Practice
and Procedure
Section 1440 . . . . . 10

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RESPONDENTS' REPLY BRIEF TO
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## I. PRELIMINARY STATEMENT

On April 22, 1976, pursuant to Rule 24(5) of the Rules of this Court, the petitioner filed a Supplementary Brief and Appendix claiming that this Court's decision involving Liberty Mutual Insurance Company v. Wetzel, _____ U.S. _____, 44 U.S. L.W. 4350 (No.74-1245, March 23, 1976) should serve as additional grounds for the granting of a writ of certiorari and the reversal of the Sixth Circuit Court of Appeals decision in the instant matter. Since we believe

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Liberty Mutual dealt solely with the issue of the "finality" of the District Court's decision pursuant to 28 U.S.C. §1291, it is submitted that the decision has no application to the instant matter. The Court of Appeals in the instant matter determined it obtained jurisdiction to review the District Court's order pursuant to 28 U.S.C.§1292(a)(1) which allows review of interlocutory orders granting injunctive relief. A copy of 28 U.S.C.§1292(a)(1) is attached hereto as Exhibit "A".

## II FACTS

A brief review of the procedural history of the instant matter will reveal why the Court of Appeals correctly held that it obtained jurisdiction. The complaint in the District Court was filed on March 23, 1973. The District Court set the case to be tried on April 4, 1973, a total of twelve days from the time the complaint was filed. A continuance was obtained for the date of the trial until May 15, 1973. However, the continuance was conditioned upon the Court's order that the respondents "shall not fill two (2) of its openings for patrolmen pending the hearing on the merits and the Court's decision thereon." See District Court's order of April 4, 1973, attached hereto as Exhibit "B". Further, the

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continuance was conditioned upon the understanding that the respondents would allow the petitioner to take the disputed police candidate examination.

Commencing May 15, 1973, a thirteen-day trial was conducted after which the matter was submitted to the Court on various briefs and arguments of counsel. While the court was considering the matter, on August 24, 1973, the District Court issued a further order in which it acknowledged that certain further vacancies had opened in the East Cleveland Police Department. Pending final disposition in the matter, therefore, the District Court required the City of East Cleveland to keep open four vacancies in its Police Department. See District Court's order of August 24, 1973 attached hereto as Exhibit "C". The East Cleveland Police Department has an authorized strength of seventy-one positions; therefore, the four vacancies required to be kept open amounted to six percent of the authorized strength of the police force.

On September 6, 1973, the District Court issued a document entitled "Memorandum Opinion and Order," which is contested herein. In this document, the Court clearly continued in effect its injunction of August 24, 1973 concerning open vacancies in the department. Further,

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in a separately denominated section entitled "Relief", the District Court stated:

"VII RELIEF

"On the basis of the reasoning above the Court rules that:

1. Defendants' enforcement of the minimum height and weight requirements for police officer applicants in East Cleveland unlawfully discriminates against women;

2. Defendants' use of the AGCT to screen applicants unlawfully discriminates against blacks; and

3. Defendants' application of the veterans' preference prior to determining whether the candidate is qualified violates Ohio law.

"In determining the proper relief, the Court must also consider any history of discrimination. With respect to the discrimination, the evidence indicates that defendants have already made positive efforts to erase the effects of past discrimination through recruitment. Therefore, the Court is not inclined to

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order affirmative relief with respect to past discrimination. However, it will enjoin the further use of the AGCT examination which unlawfully discriminates against black applicants.

"With respect to sex discrimination, the Court is convinced that there has been past discrimination. However, because the Court does not know the numbers of those women who would have applied but for the height and weight requirements, it is inclined to order only limited affirmative relief for the past discrimination. It will, however, enjoin further enforcement of the minimum height and weight requirements.

"The Court is aware that there is some leeway in fashioning relief. It therefore requests the defendants to file a proposed plan for implementation of the Court's rulings within twenty days of the date of this Order. The plaintiffs are ordered to respond to the plan within ten days thereafter. A hearing to discuss final relief will be held on October 12, 1973. Pending such a hearing the interim relief heretofore granted

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will remain in effect.

IT IS SO ORDERED.

/s/ Thomas D. Lambros
United States
District Judge

Dated: September 6, 1973."

The respondents appealed from this Order on October 3, 1973 and the petitioner cross-appealed from this Order on October 17, 1973. After thorough briefing, on April 4, 1974, the Court of Appeals determined that it had jurisdiction over the appeal.

In June of 1974, the eligibility list for appointments to the East Cleveland Police Department expired. Since at that time there were six vacancies on the Police Department (or approximately 9 percent of authorized strength), the respondents scheduled a new examination based on new procedures for June 29, 1974.

The petitioner responded to the scheduling of the test by filing in the District Court a "Motion To Hold in Contempt". One of the petitioner's grounds for the contempt motion was that the newly scheduled test would be in violation of the District Court's September 6, 1973 injunction. As the petitioner stated in her brief:

"On September 6, 1973, this court

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enjoined:

A. The City of East Cleveland from using the Army General Classification Test to screen applicants for police positions; and

B. The enforcement by East Cleveland of minimum height and weight requirements for police officer applicants in East Cleveland and found with respect to sex discrimination, there was past discrimination on the part of East Cleveland . . . .

"Despite the orders of the Court, the defendants are proceeding to administer written and physical examinations on June 29, 1974, absent any stay or consultation with the Court, even though the Court has indicated that some relief will be granted and has not ruled upon the plans for relief submitted by both parties . . . ."

In response to the petitioner's motion for contempt, the District Court enjoined the giving of the new examination, and set the matter down for hearing.

The respondents filed a motion to terminate the hearing on the grounds that jurisdiction of this matter rested in the Court of Appeals. At a hearing on July 15, 1974, the District Court

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orally ruled, and again by written opinion on July 18, ruled inter alia that it lacked jurisdiction since this matter was before the Court of Appeals.

On August 9, 1974, the petitioner moved the Court of Appeals to reconsider its April 4, 1974 Order finding of jurisdiction, which motion was denied on September 12, 1974.

## III. THE DISTRICT COURT'S SEPTEMBER 6 ORDER IS AN APPEALABLE INTERLOCUTORY INJUNCTION

The petitioner comes before this Court and claims that the District Court's September 6th Order is not an injunction because the Court merely stated that "It will enjoin the further use of the AGCT Examination which unlawfully discriminates against black applicants . . ." and ". . . It will, however, enjoin further enforcement of the minimum height and weight requirements." According to the petitioner, the foregoing language merely indicates an expression of intent on the part of the District Court to issue the injunction at some indefinite time in the future.

On June 12, 1974, however, the petitioner clearly thought that the respondents were presently and immediately enjoined by the September 6th Order. Accordingly, the petitioner

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filed a motion to hold the respondents in contempt on the grounds that the respondents would violate the Court's September 6, 1973 injunction by giving their proposed new test. Further, the petitioner must concede that the September 6th Order required the respondents to hold open four vacancies on their police force.

It is the respondents' position that the plain language of the District Court's September 6th Order is injunctive in nature and was properly appealable pursuant to 28 U.S.C.§1292(a)(1).

In determining whether an order is injunctive in nature, and hence appealable, courts will look not to the terminology of the order, but rather to the substantial effect of the order made. McCoy v. Louisiana State Board of Education, 345 F. 2d 720 (5th Cir. 1965); Hotel & Restaurant Employees v. Del Valle, 328 F. 2d 885 (1st Cir.1964). See also United States v. Cities Service Co.,410 F. 2d 662 (1st Cir.1969). This Court as well as lower courts have recognized that it is the substance of the rights affected rather than the form of the order which determines appealability. Ettelson v. Metropolitan Life Insurance Co., 317 U.S. 188 (1942); Enelow v. New York Life Insurance Co., 293 U.S. 379 (1935); General Electric Co. v. Marvel Rare Metals Co.,287 U.S. 430 (1932); Ring v. Spina, 166 F. 2d 546 (2nd Cir.1948). The manifest pur-

pose of the statute allowing appeals from interlocutory injunctions is to enable the litigant to seek proper review in an appellate court from an order or decree which in most instances is effective upon its rendition and is drastic and far-reaching in effect. See Barron & Holtzoff, Federal Practice and Procedure, Section 1440.

The injunctive order of September 6th was made after a full trial on the merits and a finding of the constitutional invalidity of the AGCT Test and the height and weight requirements. These findings, coupled with the District Court's declaration of injunction of these two testing procedures and order mandating vacancies on the police force, had the effect of enjoining the City's reliance upon these two testing methods in determining eligible applicants for the Police Department.

Obviously, the respondents would have been foolish to test applicants upon a basis which the Court had previously declared to be illegal prior to the proper review of the District Court's decision. Even the respondents' attempts in the summer of 1974 to use a new basis of testing were greeted by the petitioner's Motion for Contempt. The status of any appointees made pursuant to such testing would be in serious jeopardy. Thus, the purpose of Section 1292(a)(1) was served by a prompt review of the legality of

the District Court's September 6 Order. The District Court agreed that its decision should be reviewed by the Court of Appeals since it ordered certification pursuant to Section 1292(B) on October 24, 1973.

The District Court in its June 26, 1974 explanation of its September 6, 1973 Order attempted to modify the injunctive nature of the September 6 Order by stating that it only intended to enjoin certain activities in the future. Of course, the District Court's June 26, 1974 Opinion was issued with full knowledge of the Court of Appeals April 4, 1974 ruling which had found jurisdiction. As an initial matter, the District Court was clearly incorrect in stating that no relief other than declaratory relief was granted, since the District Court specifically continued the injunction against the City to keep open four vacancies on its 71-officer police department. Further, the District Court's interpretation of its own order takes the technical terminology approach, rather than the substantial effect approach, critized by the Fifth and First Circuits. McCoy, supra, Hotel & Restaurant Employees, supra. The substance of the District Court's orders was to enjoin the respondents from utilizing these two testing procedures, and this was sufficient to give the Court of Appeals jurisdiction to review the validity of the District Court's order declaring invalid these two testing procedures.

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The petitioner's reliance on the Liberty Mutual case is misplaced. Liberty Mutual dealt solely with the issue of whether a District Court's granting of partial summary judgment only as to the issue of liability in a declaratory judgment action satisfied the tests for "finality" to allow an appeal pursuant to 28 U.S.C.§1291. As this Court carefully pointed out, there was no interlocutory injunctive order issued in the Liberty Mutual case. As we have pointed out in this Brief, and as the Court of Appeals found in the instant matter, the District Court's opinion was an interlocutory order granting injunctive relief which was properly appealable under 28 U.S.C. §1292(a)(1).

## IV. CONCLUSION

For all the foregoing reasons, respondents respectfully request the petition for writ of certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Three (3) copies of the Respondents' Reply Brief were deposited in the regular U.S. Mail, postage pre-paid, on the 14 day of May, 1976, addressed to Jane M. Picker, Esq., 620 Keith Building, 1621 Euclid Avenue, Cleveland, Ohio, 44115, attorneys for the plaintiff-petitioner.

Attorney for
Respondents

28 U.S.C. §1292

(a) The courts of appeals have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

EXHIBIT "A"

Filed
April 4,1973

A-2

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

| | | |
|---|---|---|
| ELIZABETH A. SMITH, Plaintiff | ) | NO. C 73-299 |
| v. | ) | O R D E R |
| CITY OF EAST CLEVELAND, et al., Defendants | ) | |

LAMBROS, DISTRICT JUDGE

This case was set for trial for April 4, 1973. The defendant, City of East Cleveland, has now moved for a continuance.

After due consideration, the motion will be granted upon the following condition. The defendant, City of East Cleveland, shall not fill two of its openings for patrolmen pending the hearing on the merits and the Court's

EXHIBIT B

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decision thereon. The trial on the merits will be held on May 15, 1973 at 10:00 A.M.

IT IS SO ORDERED.

/s/ Thomas D. Lambros
Thomas D. Lambros
United States
District Judge

DATED: 4/4/73

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Filed:
August 24,1973

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

| | | |
|---|---|---|
| ELIZABETH A. SMITH | ) | CASE NO. C 73-299 |
| Plaintiff | ) | |
| v. | ) | O R D E R |
| CITY OF EAST CLEVELAND, et al., | ) | |
| Defendants | ) | |

LAMBROS, District Judge

This is a class action on behalf of all women and blacks who have been denied employment in the East Cleveland Police Department by restrictions which they claim are in violation of 42 U.S. C. §1983 and the Fourteenth Amendment. The matter presently before the Court is defendants' motion for a modification of the interim relief previously ordered by the Court.

On the basis of argument at trial

EXHIBIT "C"

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the Court previously permitted defendants to fill four of seven vacancies in the Police Department but required defendants to keep three positions open pending final outcome of this suit. Defendants now represent by affidavit, that an additional two positions are open and that they feel it necessary to fill these vacancies as well as the three originally left open by the Court.

This case having been tried and the Court having taken the case under advisement for ruling, the Court rules that its previous ruling regarding hiring pending the suit be continued in effect and that defendants should keep one of the two new vacancies open pending final disposition. The Court will, how-

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ever, permit the hiring to fill one vacancy.

Defendants' motion is therefore sustained in part and overruled in part.

IT IS SO ORDERED.

/s/ Thomas D. Lambros
THOMAS D. LAMBROS
United States District Judge

DATED: Aug. 24, 1973